

E-FILED on 6/8/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

RICHARD GALVAN,

No. C-06-4143 RMW

Petitioner,

ORDER TO SHOW CAUSE

v.

JAMES YATES, Warden,
Pleasant Valley State Prison,

[Re Docket No. 1]

Respondent.

Richard Galvan petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court will require respondent to show cause why a writ of habeas corpus should not be granted.

I. BACKGROUND

On October 13, 2000, 14-year-old Lucy Doe went to a party with her older sister, Maria. At the party, Lucy met Jose Mancera, Hijinio Haro and 15-year old petitioner Richard Galvan, among 15 or 20 people who were there. From approximately 9:30 p.m. through 11:30 p.m., Lucy smoked marijuana. Petitioner tried "to come on to" Lucy twice, but she rejected him and pushed him away. Near midnight, Lucy felt "high" from the marijuana and began drinking alcohol. She could recall she had two shots of Jack Daniels and a swig of beer at the party.

1 At about 1:30 a.m. on October 14, 2000, Brian Wilde heard moaning from the area of some
2 bushes in a park when he was waiting for his girlfriend. Wilde described the moaning as loud,
3 unpleasant and "sexual", as if it was from a woman in pain. As he approached the bushes, a group of
4 Hispanic males got up and ran away. He discovered Lucy lying on the ground with no clothing on.
5 Wilde's girlfriend, Christina Benson, approached and tried to ask Lucy questions and tap her face,
6 but Lucy responded with more moans, trying to open her eyes and sit up.

7 Petitioner testified that early in the evening, Lucy, Mancera, petitioner and some others left
8 the party and went to the park across the street. When Mancera walked Lucy into the bushes, Lucy
9 showed no hesitation. In the bushes, Lucy was moaning, but she did not appear to be in distress.
10 Some time later Mancera came out and told petitioner to "go for it." When petitioner went into the
11 bushes, Lucy was sitting up, with her pants around her ankles. Petitioner talked to Lucy, making
12 comments, and kissed her. He believed Lucy consented to have sex with him because she kissed
13 him back and lay down. Even when he touched her breast and her pelvic area, Lucy did not show
14 any negative response. However, when they began to have sex, petitioner's penis came out because
15 he was not erect. Petitioner testified that he "tapped" Lucy because he was embarrassed by his lack
16 of an erection when the others were around.

17 Lucy testified that she remembered nothing that happened after she drank the alcohol, or the
18 events in the bushes. She claimed that she did not intend to have sex, or oral or digital penetration
19 with either Mancera or petitioner. Further, she did not recall agreeing to go to the park, going to the
20 park, or speaking with Mancera or petitioner. She did not know whether or not she agreed to have
21 sex with Mancera or petitioner. Also, she could not recall whether she spoke to petitioner about sex,
22 or whether she consented to any sexual conduct.

23 Witness Haro testified Lucy drank most of a bottle of Jack Daniels at the party, and drank
24 more in the park. Haro testified that he heard Mancera tell the group that Lucy wanted to have sex
25 with them, and that he saw Lucy have sex with Mancera and petitioner. Haro's trial testimony
26 differed from the statement he gave to the police in important respects. Haro gave a statement to the
27 police that he saw petitioner tell Lucy to "shut up" and slap her face even though Lucy appeared to
28 be "knocked out" during sex, and also saw Mancera put his penis in Lucy's mouth briefly. However,

1 his trial testimony was that Lucy consented to sex and was not so drunk, and he did not see
2 petitioner hit or slap Lucy.

3 By motion, petitioner sought to introduce evidence of Lucy's recent sexual conduct.
4 Specifically, there was evidence that Lucy had consensual sexual relationships while drinking, in the
5 same park location, with Haro and Mancera the week before the charged incident. The district
6 attorney argued that under Evidence Code section 1103, the sex with Haro was not relevant, and the
7 sex with Mancera was not relevant to petitioner's case because it was not sex with petitioner. The
8 prosecution also asked the court to exclude evidence that Lucy possessed several condoms and gave
9 her sister condoms on the night of the incident. Defense counsel argued that the evidence of Lucy's
10 recent sexual conduct was relevant to demonstrate the element of consent with Mancera, which,
11 according to defense counsel, would have been critically relevant to Lucy's consent to have sex with
12 petitioner. In addition, to the extent Lucy denied at trial that she intended to have sex with Mancera
13 or the others, defense counsel asserted that the evidence would serve to attack Lucy's credibility.
14 Nonetheless, the trial court granted the prosecution's motion to exclude the evidence on the grounds
15 that "the probative value is outweighed by the prejudicial effect" and the evidence was "incidental,
16 collateral" and "irrelevant." The defense counsel also challenged the trial court's exclusion of Haro's
17 sexual conduct with Lucy a week before the charged offense on the ground that the Sixth and
18 Fourteenth Amendments guarantee the accused's right to conduct cross-examination at trial.

19 Petitioner was charged with two counts of forcible rape in concert, forcible sexual
20 penetration in concert, forcible oral copulation in concert, rape by an intoxicating substance, sexual
21 penetration by an intoxicating substance, with two special enhancement allegations. The jury found
22 petitioner guilty on all counts except for one rape count and the charge of forcible sexual penetration
23 in concert (but the jury found petitioner guilty of the lesser offense of assault with intent to commit
24 forcible sexual penetration). On October 22, 2003, after denying petitioner's motion for a new trial,
25 the court sentenced petitioner to a total of 16 years in prison. On April 13, 2005, the California
26 Court of Appeal, Sixth District affirmed petitioner's convictions and the exclusion of the evidence in
27 an unpublished opinion on April 13, 2005. The California Supreme Court denied petitioner's
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1 petition for review on July 13, 2005. Petitioner then filed a petition for writ of habeas corpus in this
2 court on July 3, 2006.

3 II. ANALYSIS

4 A. Standard of Review

5 This court may entertain a petition for writ of habeas corpus on "behalf of a person in
6 custody pursuant to the judgment of a state court only on the ground that he is in custody in violation
7 of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*,
8 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an order directing the
9 respondent to show cause why the writ should not be granted, unless it appears from the application
10 that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243.

11 B. Petitioner's Claims

12 Petitioner asserts two grounds for federal habeas relief. First, he claims that the trial court's
13 exclusion of the evidence of Lucy's alleged recent sex Mancera and Haro at the same location, and
14 Lucy's possession and distribution of condoms on the night of the events was prejudicial and
15 deprived petitioner of his due process rights. Specifically, under Evidence Code section 1103(c),
16 although evidence of Lucy's sexual conduct with others is not admissible to prove her consent,
17 petitioner contends that this section does not bar evidence of sexual conduct of the victim to attack
18 her credibility. Further, petitioner contends that because whether Lucy's sexual acts with Mancera
19 were consensual is relevant to the crimes of which petitioner was convicted, evidence of prior sexual
20 acts with Mancera was admissible under section 1103. Petitioner also claims he was entitled to
21 introduce evidence that Lucy possessed and distributed condoms on the night of the incident,
22 because it could logically support the inference that the sex acts with petitioner were not against her
23 will.

24 Second, petitioner claims that the deprivation of petitioner's right to cross-examine Haro was
25 a Constitutional error because the Sixth and Fourteenth Amendments guarantee the right of an
26 accused to confront witnesses against him. Petitioner contends that had defense counsel been
27 permitted to conduct a cross-examination of Haro, a reasonable jury might have received a different
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1 impression of Haro's credibility. The court will require respondent to show cause why the petition
 2 for a writ of habeas corpus should not be granted on either of these two grounds.

3 **III. ORDER**

4 Respondent is ordered to show cause why petitioner's petition for a writ of habeas corpus,
 5 filed on July 3, 2006, should not be granted.

- 6 **1.** The clerk shall serve by mail a copy of this order and the petition and all attachments thereto
 7 upon the respondent and the respondent's attorney, the Attorney General of the State of
 8 California.
- 9 **2.** Respondent shall file with the court, within sixty days of the issuance of this order, an answer
 10 conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing
 11 cause why a writ of habeas corpus should not be granted. Respondent shall file with the
 12 answer a copy of all portions of the state record that have been transcribed previously and
 13 that are relevant to a determination of the issues presented by the petition. If petitioner
 14 wishes to respond to the answer, he shall do so by filing a traverse within thirty days of the
 15 filing of the answer.
- 16 **3.** Respondent may file a motion to dismiss on procedural grounds in lieu of an answer, as set
 17 forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases
 18 within sixty days of the issuance of this order. If respondent files such a motion, petitioner
 19 shall file with the court an opposition or a statement of non-opposition within thirty days of
 20 the filing of the motion, and respondent shall file with the court a reply within fifteen days of
 21 the filing of any opposition.

22
 23
 24 DATED: 6/6/08


 25 RONALD M. WHYTE
 26 United States District Judge
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 28

1 **Notice of this document has been electronically sent to:**

2 **Counsel for Petitioner:**

3 Dennis P. Riordan dennis@riordan-horgan.com

4 **Counsel for Respondent:**

5 No appearance

6
7 Counsel are responsible for distributing copies of this document to co-counsel that have not
8 registered for e-filing under the court's CM/ECF program.

9
10 **Dated:** 6/8/08

/s/ MAG
Chambers of Judge Whyte